

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) 02:02-cr-0416-GEB
Plaintiff,) ORDER
v.)
DAWANE MALLETT,)
Defendant.)

The Ninth Circuit remanded this action for the district court to determine whether Defendant would have received a materially different sentence if the district court had known the Sentencing Guidelines ("Guidelines") were advisory rather than mandatory when Defendant was sentenced. Following the remand, I issued an Order to the parties on October 28, 2005, in which their views were requested on this issue. Each party filed a response to the October 28 Order.

To determine the remand issue, I have reviewed the Presentence Investigation Report ("PSR"), the Forensic Evaluation on Defendant prepared by the Mental Health Department in Butner, North Carolina ("Forensic Evaluation"), the transcript of Defendant's February 6, 2004, sentencing hearing, and the portion of the transcript of Defendant's jury trial when he interrupted the

1 prosecutor's closing argument and also engaged in other obstructionist
2 behavior.

3 I have determined that Defendant's sentence would not have
4 differed materially from that which was imposed because of the
5 following reasons.

6 During Defendant's sentencing hearing held on February 6,
7 2004, I stated, among other things, that "[t]he sentencing factors in
8 Title 18, United States Code Section 3553, and in particular the
9 deterrence and protection of the public factors, reveal that a
10 sentence at the top of the Guidelines should be imposed." (Sentencing
11 Hr'g Tr. 17, Feb. 6, 2004.) Yet, I imposed the middle of the
12 Guideline sentence recommended by Probation in the PSR. Thus, even
13 though I thought about sentencing Defendant at the top of his
14 Guideline range, I must have realized that Probation's recommended
15 sentence in the middle of that range was sufficient for purposes of
16 sentencing under 18 U.S.C. § 3553(a).

17 The transcript also reveals I discussed the correctness of
18 "the first diagnosis" in the Forensic Evaluation, but I did not
19 explain what is referenced by "the first diagnosis," nor the bearing
20 that diagnosis had on my conclusion that "all of [Defendant's]
21 disruptions [while his case was pending] were contrived." (Id. at
22 16.) What I meant by the "first diagnosis" is Defendant's principal
23 diagnosis of "Antisocial Personality Disorder . . . based on his
24 pattern of disregard and violation of the rights of others since at
25 least age 14."¹ (Forensic Evaluation at 8.)

27 ¹ The Forensic Evaluation stated that Defendant was "on no
28 medication and does not require medical or mental health follow-
up. . . . Based on his past history he is at high risk of
(continued...)

1 Thus, notwithstanding my indication at Defendant's
2 February 6 sentencing hearing that he deserved a sentence at the top
3 of the Guidelines, I followed Probation's middle-of-the-Guideline
4 recommendation.

5 "Even though the Guidelines are no longer mandatory . . .
6 the district court should still consult them for advice as to the
7 appropriate sentence. . . ." United States v. Kimbrew, 406 F.3d 1149,
8 1152 (9th Cir. 2005).

9 Defendant's Guideline range is from 262 to 327 months
10 imprisonment. A portion of Defendant's sentence, however, was imposed
11 by virtue of mandatory minimum statutory requirements that are non-
12 Guideline. Specifically, Defendant's sentence on Counts 2 and 4 are
13 driven by statute, resulting in Defendant receiving a 360 month
14 statutory sentence consecutive to whatever Guideline sentence he
15 received. Thus, this 360 month "statutory minimum sentence[], [is]
16 not . . . sentencing [under the] guidelines." United States v. Dare,
17 425 F.3d 634, 642 (9th Cir. 2005).

18 Unless an 18 U.S.C. § 3553(a) factor, or another matter of
19 which I am made aware, indicates that a sentence should be imposed
20 outside the advisory Guideline range, I will exercise my sentencing
21 discretion by imposing a sentence inside that range. Under § 3553(a),
22 when determining the particular sentence to be imposed, I am required
23 to consider:

24
25 ¹(...continued)
26 violence. . . ." (Forensic Evaluation at 9.) This conclusion in the
27 Forensic Evaluation that Defendant does not require "mental health
28 follow-up" differs from that in the PSR where Probation states
"defendant suffers with mental health problems . . . and he may well
benefit from mental health and sex offender counseling while in
custody." (PSR at 26.) I adopt the federal forensic evaluators'
position on this point.

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available. . . .

18 U.S.C. § 3553(a)(1), (2), (3).

The nature and circumstances of the offenses and the history and characteristics of the defendant, weigh in favor of a sentence toward the top of the Guidelines. Defendant's life story since his teenage years is essentially that of an incorrigible juvenile delinquent and criminal recidivist. As the Forensic Evaluation states, "allegations" about Defendant's upbringing indicate he lacked sufficient parental guidance. Even if this is true, the record reveals Defendant has chosen a life of crime to eke out a livelihood. He reported to Probation that he has supported himself by "rob[ing] people." (PSR at 22.) As Probation states, Defendant's "behavior both in and out of custody illustrates he has no intention of being a law-abiding citizen." (PSR at 26.) His behavior and attitude shows he has "little regard for human life or the property of others." (Id.) This was evidenced when Ms. Montoya spoke at Defendant's sentencing hearing. Ms. Montoya is the victim of Defendant's

1 assaultive behavior in connection with his conviction for bank
2 burglary. She was forced into a vehicle, sexually assaulted by
3 Defendant, kidnaped, and eventually placed into a trash dumpster from
4 which she had to forcibly free herself. When she spoke, Defendant
5 smirked, evincing his unremorsefulness and contempt for a victim of
6 his criminal conduct.

7 Defendant also showed an unrepentant, defiant, and
8 obstreperous attitude when he interrupted the prosecutor's closing
9 argument with the following communication, knowing jurors would hear
10 him: "He's lying. Shut your white ass up. . . . Fuck the jury and
11 all y'all white mother fuckers . . . Guilty. Both defendants are
12 guilty."² (Trial Tr. vol. 4, 694, Nov. 6, 2003.) Further, after the
13 Judge responded stating "the jury is in recess," Defendant further
14 stated "Both defendants are guilty. Terrance Mallett is guilty. Fuck
15 all you white _ _ _."³ (Id. at 695.) In addition, as the jurors were
16 on their way to the courtroom exit doors, Defendant further
17 communicated with jurors:

18 DEFENDANT D. MALLETT: The black lady going to die.
19 All you mother fuckers are going to die. White
son-of-a-bitch. Old pieces of shit. Fuck white
people. Fuck all the females.

20 THE COURT: The jury is instructed to disregard
21 what the defendant states.

22 DEFENDANT D. MALLETT: Kill all your mother
23 fucking grandkids. Don't put your press on me,
homey. Fuck your kids. Fuck your grandkids.

24
25 ² But Defendant did not confess guilt at his sentencing hearing
26 on February 6, 2004. In response to my question "Do you want to say
27 anything before I sentence you?" Defendant responded, "Yeah. I would
like to say that I'm innocent, and even though I was found guilty by
this jury, I'm still innocent." ((Sentencing Hr'g Tr. 9.))

28 ³ The record indicates that the reporting of Defendant's
communication was discontinued at this point because the Judge spoke.

1 Fuck your grandkids. Fuck your mother fucking
2 family. I'm going to kill all you mother fuckers.
3 Fuck you too, Burrell. Fucking bitch. I'm cool.
4 I'm cool. Don't put pressure on me. I'm serious,
man, don't put no pressure. I said I'm cool.
Don't put no pressure.

5 (Id.)

6 I opine these outbursts and threats were contrived to
7 intimidate the jurors and to cause a mistrial. This obstructionist
8 behavior shows Defendant's contempt for the judicial process and those
9 involved with it.

10 Defendant's armed attempted robberies and bank burglary and
11 kidnaping were serious offenses. Thus, the sentence imposed should
12 "afford adequate deterrence of [Defendant's] criminal conduct" and
13 "protect the public from further crimes of the defendant. . . ."
14 Nothing in the record justifies imposing other than an advisory
15 Guideline sentence in this case. The issue is whether a sentence in
16 the middle of the advisory Guideline range was sufficient to protect
17 the public from further crimes of the Defendant and satisfy the other
18 § 3553(a) sentencing factors. This sentence was sufficient because of
19 the age Defendant will reach upon his release; hopefully by then he
20 will have realized the wrongness of the choices he made for several
21 years and opt for a law-abiding existence. The record does not
22 justify a lesser sentence because the sentencing factors favor
23 imposition of a sentence that will reasonably ensure the Defendant
24 stays in prison until the age when he should not pose a criminal risk
25 to others when he is released. Since Defendant's Guideline range is
26 lengthy, he should not be sentenced at the top of that range.

27 In summary, nothing in the record indicates I felt
28 constrained by the Guidelines when I sentenced Defendant. For the

1 stated reasons, the middle of the Guideline sentence imposed is
2 sufficient for sentencing purposes even though Guidelines should have
3 been considered advisory when the sentence was imposed.

4 Defendant Mallett is advised that he may appeal from this
5 Order. If Defendant cannot afford the cost of an appeal, he may
6 request leave to proceed in forma pauperis. Defendant has already
7 been appointed counsel, but I, nevertheless, am informing Defendant of
8 his right to counsel on appeal. If Defendant cannot afford an
9 attorney, one will be appointed to represent him. Any appeal must be
10 filed in the district court within ten days after this Order is filed.

11 IT IS SO ORDERED.

12 DATED: November 29, 2005

13 /s/ Garland E. Burrell, Jr.
14 GARLAND E. BURRELL, JR.
15 United States District Judge
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